84 - 1415 (3)

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Case No. _____

UNITED STATES SUPREME COURT
1984 Term

LEO L. MARTELON,

Petitioner,

v.

HERBERT R. TEMPLE, JR., Director of the National Guard Bureau; JOHN L. FRANCE, Adjutant General of the Colorado Department of Military Affairs; WILLIAM K. WHITE; PAUL A. PARSONS; STEPHEN T. ERICKSON; and JAMES T. MILLER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX 1

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

LEO L. MARTELON,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	
	)	No. 83-2141
HERBERT R. TEMPLE, JR., Director of the National Guard Bureau; JOHN L. FRANCE, Adjutant General of the Colorado Department of Military Affairs; WILLIAM K. WHITE, PAUL A. PARSONS, STEPHEN T. ERICKSON, and JAMES T. MILLER,	)	
	)	
Defendants-Appellees.	)	
	)	
NATIONAL FEDERATION OF FEDERAL EMPLOYEES,	)	
	)	
Amicus Curiae.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D.C. No. 81-C-2196)

Barry D. Roseman of Denver, Colorado for Plaintiff-Appellant

Nancy E. Rice, Assistant U.S. Attorney, Denver, Colorado, for Defendant-Appellee Herbert R. Temple, Jr.

William F. Eggert of Hall & Evans, Denver, Colorado for Defendants-Appellees, France, White, Parsons, Erickson and Miller.

Catherine Waelder, General Counsel and Clinton D. Wolcott, Staff Attorney for National Federation of Federal Employees, Washington, D.C., submitted a brief for Amicus Curiae.

Before LOGAN, BREITENSTEIN and McWILLIAMS, Circuit Judges.

BREITENSTEIN, Circuit Judge.

This is an appeal from the district court's summary judgment for the defendant-appellees. Plaintiff-appellant claims that he was involuntarily reassigned within, and dismissed from, the Colorado Army National Guard in violation of 42 U.S.C. § 1983 and 32 U.S.C. § 709(e). Jurisdiction lies under 28 U.S.C. § 1331 and § 1343(a)(3). We affirm.

The defendants are all officers of the Colorado Army National Guard, COARNG. In this court Major General Herbert R. Temple, Jr. was substituted for Emmet H. Walker, Jr. as Director of COARNG.

Martelon, plaintiff-appellant, sought full-time employment in the COARNG as an administrative supply technician. He was informed in writing that his employment was "contingent upon membership in the Colorado National Guard." R. 337. He enlisted in the Guard on November 1, 1974, was employed as an administrative supply technician on November 3, 1974, and assigned to the 220th Military Police Company. His duties required that he supervise military material for his unit. On June 21, 1983, he was involuntarily reassigned to the 193rd Police Battalion. No comparable civilian activity was available in the 193rd Police Battalion. On August 1, 1983, his civilian job was terminated because his new military assignment was incompatible with his continued civilian employment as an administrative supply technician.

Plaintiff then filed this suit seeking relief from his termination as a technician in the Guard. He alleged three grounds for relief. First, appellees breached his contract by involuntarily transferring him from one military unit to another. He does not pursue this ground on this appeal. See appellant's brief, p. 4, n. 4. Second, appellees violated his constitutional rights in not affording him a hearing before his termination as a technician of 42 U.S.C. § 1983. Third, appellees violated 32

U.S.C. § 709(e) by terminating his employment for a reason not specified in the statute. The court granted summary judgment for the appellees. There is no issue of material fact. Our review is limited to whether the court correctly applied the substantive law. Western Cas. & Sur. v. National Union Fire Ins., 10 Cir., 677 F.2d 789, 791, n. 1.

Plaintiff does not contest that appellees had the authority to transfer him to a different military unit. The trial court noted, R. 454, that,

> "...plaintiff has not cited, and I have not found, any section of the enlistment contract either guaranteeing his assignment to a specific military unit or limiting the Guard's ability to reassign him."

The enlistment contract signed by plaintiff specifically says, R.68:

> "I have had this contract fully explained to me, I understand it, and certify that *no promise* of any kind has been made to me concerning assignment to duty..." [Emphasis supplied.]

The United States Constitution in Art. 1, § 8, cl. 12-16, grants control of the Military to the Congress and not to the courts. As said in Chappel v. Wallace, ___U.S.___, 103 S.Ct. 2362, 2366:

> "It is clear that the Constitution contemplated that the Legislative Branch has plenary control over rights, duties, and responsibilities in the framework of the military establishment, including regulations, procedures and remedies related to military discipline:..."

In Chappell the Court held that "military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations." Id. at 2368. In Chappell, five enlisted men of the United States Navy brought an action against their military superiors pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, claiming that because of their minority race defendants failed to assign them desirable duties, gave them low performance valuations, threatened them, and imposed penalties of unusual severity. Bivens held that federal officers may be sued for damages arising out of civil rights violations.

In refusing to allow a Bivens remedy for military personnel against their superior officers, the Court said, Chappell, supra, 103 S.Ct. at 2365:

> "Civilian courts must, at the very least, hesitate long before

> entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment."

In Gilligan v. Morgan, 413 U.S. 1, the Court refused to entertain a suit by university students under § 1983 asking that the courts examine the pattern of training, weaponry and orders of the Ohio National Guard, saying, Id. at 10:

> "It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence."

Plaintiff's reliance on Johnson v. Orr, No. 82-2578 D.C.N.J. is misplaced. In that case, technicians claimed that they were terminated as a result of their union activities. In declining to follow Chappell, the New Jersey district court found that the technicians' claims were incident to their civilian, not military, employment. In the case at bar, termination following his involuntary military transfer is clearly related to military employment. The record amply demonstrates the dissatisfaction of plaintiff's superiors with plaintiff's military performance. R. 78-145. The record also shows that the dissatisfaction was the cause of plaintiff's transfer.

Chappell involved a Bivens claim, while here § 1983 is the basis for relief. The difference is due to the identity of the defendants. In Bivens they were federal officers. Here they are state officers and federal relief must be based on § 1983. In Chappell the Court failed to address the § 1985 claim brought by the enlisted men against their superiors. The Court stated that its decision in Feres v. United States, 340 U.S. 135, guided its analysis in Chappell. Supra, 103 S.Ct. at 2365. In Feres the Court held that the Federal Tort Claims Act did not extend to injuries suffered by military personnel in service. The Court pointed out that no such liability existed before the Federal Tort Claims Act and that Congress never intended to create such liability.

Before the passage of § 1983, there was no liability on the part of military superiors for transgressions against the rights of other military

personnel. By the passage of § 1983, Congress never intended to create such rights. See the Court's review of the legislative history of § 1983 found in Allen v. McCurry, 449 U.S. 90, 98-99. The plaintiff's § 1983 claim has no merit.

Plaintiff argues that defendants terminated him for a reason not specified in the statute. Section 709(e)(1), 32 U.S.C., provides:

> "Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned—(1) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who is separated from the National Guard or ceases to hold the military grade specified for his position by the Secretary concerned shall be promptly separated from his technician employment by the adjutant general of the jurisdiction concerned."

The district court found, R. 455, that "a civilian technician ceases to hold the requisite 'military grade' when he or she is reassigned to a military unit from which the civilian technician duties cannot be performed." Plaintiff says that because grade is defined in 32 U.S.C. § 101 (10) to mean "a step or degree, in a graduated scale of office or military rank, that is established and designated as a grade by law or regulation," the district court is wrong. The defendants say that the statute anticipates that it shall be expanded by the promulgation of regulations. Section 709(a) provides that "[u]nder *regulations prescribed* by the Secretary of the Army or the Secretary of the Air Force...persons may be employed as technicians in...the National Guard." [Emphasis supplied.] Section 709(e) begins "[n]ot withstanding any other provision of law *and under regulations* prescribed by the Secretary concerned..." [Emphasis supplied.]

Plaintiff was terminated under Technician Personnel Regulation 302.7-9 which reads, R. 262:

> "A National Guard technician must be assigned to an appropriate military unit (to include military grade and specialty) in the State where his technician job is located (see 32 U.S.C. 709(b)). The concept of the National Guard technician program is that technicians will be militarily assigned to the same unit in which his technician job is located. In other words, a technician will perform his tech-

nician duties, his military training duties, and be mobilized to active duty in the same unit."

Technician Personnel Regulation 752.2-3, brief of Amicus Curiae, Add. 55, mandates removal of technician employment when a technician "fails to maintain the military grade/rank, branch of service, or compatible military assignment for the position occupied."

The question is whether the regulations are consistent with § 709(e). The rule-making authority granted to an administrative agency is not power to make law. Rather it is "the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213-214. Resort is to the legislative history of the National Guard Technicians Act of 1968, of which § 709(e) is a part. See United States v. Earth Sciences, Inc., 10 Cir., 599 F.2d 368, 372. The legislative history of the Act shows that Congress considered that the military mission of the technicians was paramount and that the technician's duties were inseparable from his or her military obligations. See American Federation of Government Employees v. Federal Labor Relations Authority, D.C. Cir., 730 F.2d 1534, 1542-1547.

The Senate Report accompanying the bill, S.Rep. No. 1446, 90th Cong. 2d Sess., R. 236, says:

> "The concept of the technician program is that the technicians will serve concurrently in three different ways: (a) Perform full-time civilian work in their units; (b) perform military training and duty in their units; and (c) be available to enter active Federal service at any time their units are called."

At R. 254, the Report says:

> "The concept of the full-time civilian technician program is that his civilian work will be performed in the same unit in which he holds a mobilization assignment. In other words, the technician would perform his civilian work, his training duty, and be mobilized to active duty in the same unit... It is the view of the Committee, therefore, that technicians who are required to be military members of the National Guard should occupy a military position which is compatible with their civilian technician position."

See also the remarks of Congressman Pickle, 113 Cong. Rec. 3838 and

of Senator McIntyre, 114 Cong. Rec. 23,254-23,255.

Plaintiff also argues that the agency has impermissibly broadened the removal provisions of § 709(e)(1) because the term "grade" as used therein does not refer to the military unit in which the technician is serving. The Act need not contain this level of detail. In American Federation of Government Employees v. Federal Labor Relations Authority, D.C. Cir., 730 F.2d 1534, the court considered the argument that the National Guard was required to bargain over a union proposal to eliminate consideration of technician's military performance from reduction in force actions because the statute did not mention "'evaluations' or their use" in § 709(e). The court said, Id. 1544:

> "This argument is bootless. The Act need not descend to such detail. The evaluation and rating of personnel are implicit in every military organization, their use is fundamental and need not be explicated."

The Senate Report and the remarks of members of Congress show that Congress intended that technicians be compatible in their military and civilian unit assignments. Given such legislative history, it is inconceivable that regulations mandating compatibility should be interpreted as inconsistent with § 709(e). The military has great and wide discretion in the formation, application, and interpretation of military regulations. Noyd v. McNamara, 10 Cir., 378 F.2d 538, 540. We agree with the district court's holding that, R. 455, "a civilian technician ceases to hold the requisite 'military grade' when he or she is reassigned to a military unit from which the civilian duties cannot be performed."

Affirmed.

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 81-C-2196

LEO L. MARTELON,

Plaintiff,

v.

EMMET H. WALKER, JR., Director, National Guard Bureau, JOHN L. FRANCE, Adjutant General, Colorado Department of Military Affairs; WILLIAM K. WHITE, PAUL A. PARSONS, STEPHEN T. ERICKSON, and JAMES T. MILLER,

Defendants.

ORDER

Plaintiff, Leo L. Martelon, filed this action seeking relief from his involuntary reassignment within and subsequent termination from the Colorado Army National Guard (Guard). Defendants are the plaintiff's supervisors in the Guard. Jurisdiction is founded on 28 U.S.C. §§ 1331, 1343(3).

The parties have filed cross-motions for summary judgment supported by extensive memoranda and exhibits. On July 28, 1983, I heard testimony and received evidence on these motions. The issues raised are ripe for determination.

Martelon sought full-time *civilian* employment in 1974 as an administrative supply technician for the Guard. A prerequisite to obtaining this civilian employment was prior enlistment for *military* service in the Guard. Martelon enlisted in the Guard as a staff sergeant on November 1, 1974, and was employed as an administrative supply technician starting on November 3, 1974.

Plaintiff's employment as a civilian technician required that he supervise the military materiel for the unit to which he was assigned. On June 21, 1983, he was reassigned involuntarily from the 220th Military Police Company to the 193rd Military Police Battalion. Plaintiff's

civilian employment was terminated on August 1, 1983, because his new assignment at the 193rd was incompatible with his continued employment as an administrative supply technician for the 220th. No comparable civilian job was available with the 193rd.

Plaintiff here asserts three claims for relief. First, he asserts a civil rights claim under 42 U.S.C. § 1983. He contends that he had a property right in continued civilian employment and the defendants' assigning him to a different post, thus "taking" his job rights, without a hearing, violated due process. Plaintiff seeks reinstatement to his civilian employment, compensatory damages, and punitive damages.

In considering claims of this nature, courts must exercise caution and self restraint to avoid interfering with military affairs. The United States Constitution grants control of the military to Congress, not the courts. U.S. Const. Art. I, § 8, cls. 12-14. "Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment." *Chappell v. Wallace,* 51 U.S.L.W. 4733, 4735 (June 13, 1983).

The Constitution grants Congress broad power "[t]o provide for organizing, arming, and disciplining..." the National Guard. U.S. Const. Art. I, § 8, cl. 16. "It would be difficult to think of a clearer example of the type of government action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence." *Gilligan v. Morgan,* 413 U.S. 1, 10 (1973).

In *Gilligan,* the Supreme Court determined that the District Court had no authority to grant relief for the National Guard's alleged violations of 42 U.S.C. § 1983. That case dictates the result here. I find and conclude that Martelon's claim seeking relief for alleged violations of 42 U.S.C. § 1983 raises issues not appropriate for determination in this court. A federal trial judge is not competent to review decisions of Army National Guard officers in assigning personnel, at least in the circumstances here presented. There is no genuine issue as to any material fact. Defendants are entitled to judgment as a matter of law on this claim. F.R.Civ.P 56(b). Thus, the defendants' motion for summary judgment on the plaintiff's first claim for relief is granted.

Plaintiff's second claim for relief alleges that his reassignment violated

his enlistment contract. However, the plaintiff has not cited, and I have not found, any section of the enlistment contract either guaranteeing his assignment to a specific military unit or limiting the Guard's ability to reassign him. Thus, I find that there is no genuine issue of material fact on this issue and conclude that the plaintiff's breach of contract claim is unsupported. The defendants, therefore, are entitled to summary judgment on this claim as well.

Plaintiff's third claim alleges that termination of his civilian employment violated 32 U.S.C. § 709. Defendants respond that termination of the plaintiff's employment was authorized by 32 U.S.C. § 709(e)(1) and was within the Guard's inherent power to reassign personnel to help ensure national security.

Congress has required that "a technician who is employed in a position in which National Guard membership is required as a condition of employment and who...ceases to hold the military grade specified for his position..." shall be relieved from his civilian position. 32 U.S.C. § 709(e)(1). In *Allen v. United States,* 571 F.2d 14 (Ct. Cl. 1978), the court held in similar circumstances that "civilian duties cannot stand alone to comprise a job distinct from the military activities." *Id.* at 18. Further, a Senate Armed Service Committee report states that the civilian technician program requires that a civilian technician's work be performed in the same unit in which he or she holds a military assignment. S. Rep. No. 1446, 90th Cong., 2d Sess. (1968).

I find and conclude that a civilian technician ceases to hold the requisite "military grade" when he or she is reassigned to a military unit from which the civilian technician duties cannot be performed. Thus, the defendants' termination of the plaintiff's employment was authorized by 32 U.S.C. § 709(e)(1).

Further, I find and conclude that the Guard has the inherent power necessary to terminate a technician's employment if the technician's reassignment to a different military unit is incompatible with his or her civilian employment. The defendants' motion for summary judgment on the plaintiff's third claim for relief is granted.

Accordingly,

IT IS ORDERED that this action is dismissed with prejudice, each party to bear his own costs.

Dated at Denver, Colorado, August 5, 1983.

BY THE COURT:

JIM R. CARRIGAN, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX 3

NOVEMBER TERM — December 7, 1984

Before Honorable James K. Logan, Honorable Jean S. Breitenstein and Honorable Robert H. McWilliams, Circuit Judges.

LEO L. MARTELON,

Plaintiff-Appellant,

v.

MAJOR GENERAL HERBERT R. TEMPLE, Jr., etc., et al.,

Defendants-Appellees.

No. 83-2141

This matter comes on for consideration of appellant's petition for rehearing filed in the captioned cause.

Upon consideration whereof, appellant's petition for rehearing is denied.

HOWARD K. PHILLIPS, Clerk

APPENDIX 4

7-3. EMPLOYMENT POLICY

The provisions of 32 U.S.C. 709 (PL 90-486) requires that "...a technician who is employed in a position in which National Guard membership is required as a condition of employment and who is separated from the National Guard or ceases to hold the military grade specified for his position by the Secretary concerned shall be promptly separated from his technician employment by the Adjutant General of the jurisdiction concerned;..." (and) "a technician shall be notified in writing of the termination of his employment as a technician, and such notification shall be given at least 30 days prior to the termination date of such employment." All appointments, reassignments, or promotions to positions that require military membership will be in the excepted Federal service, and candidates will meet all qualification requirements prior to placement.

a. The following are requisite for technician employment:

(1) All technicians must maintain appropriate military membership, military grade, and branch of service (except as provided for in paragraph 7-9) for the technician position occupied; meet the required military security standards; and meet the military physical requirements appropriate for the compatible military assignment.

(2) General officers may not be employed as technicians, unless the technician position description requires the incumbent to be a commander of a tactical combat unit.

(3) Technicians may not be assigned as Assistant/Deputy Adjutant General.

b. Technicians who do not meet the above will be given a written 30-day advance notice of termination and promptly separated.

Notification of separation. Before a request for Federal recognition that adversely affects a technician's tenure (i.e., promotion to general officer, enlisted technician receiving a commission) is sent to the NGB, the technician will be notified by the TPO regarding the effects Federal recognition will have on his technician employment (see S-11, TPR 8311). As a minimum, the notification should be in letter form (see TPR 302.C). The technician will sign and date the letter acknowledging that he has been notified and understands that termination from technician

employment will follow. The signed letter will also reflect the technician's decision to discontinue/continue the Federal recognition process.

If the technician elects to continue the Federal recognition, processing the letter will serve as the advance written notice of termination. A copy of the signed letter will then become a part of the Federal recognition paperwork that is forwarded to the NGB. The letter will be dated when signed by the technician, and that date will serve as the 30-day advance notice period for termination. The actual start of the 30-day notice period begins the day after the date shown on the letter. This letter authorizes the technician's termination concurrently upon receipt of Federal recognition, provided the 30-day advance notice period has elapsed. No such separations will be made effective during the period of 15 December through 3 January.

Military Disqualifications. Except for pending disability retirement claims, technicians who are found to be unqualified for further Guard membership may continue to be employed in their technician position for no more than 30 days after loss of military membership. When the date of the military action is known in advance, the 30-day notice will be issued at the earliest practicable date so, when possible, the military and technician actions will coincide. No such separations will be effected from 15 December through 3 January.

Voluntary Military Disqualification. When a technician takes a voluntary action that alters his military status (i.e., applies for a commission, acknowledges his intention to resign from the Guard or not to reenlist, accepts certain promotions, etc.), immediate steps should be taken by the TPO to notify the individual regarding loss of technician employment. The notification should address loss of benefits, ineligibility for severance pay and discontinued service retirement, etc.

The technician should sign a statement acknowledging that he understands the effects of such action on his technician employment. The statement will be dated when signed by the technician and will serve as the 30-day advance notice period of termination. The actual start of the 30-day notice period begins the day after the date shown on the statement. The statement authorizes the technician's termination when the military action is effected, provided the 30-day notice period has elapsed. No such separations will be effected from 15 December through 3 January.

APPENDIX 5

7-9. TECHNICIAN/MILITARY COMPATIBILITY

A National Guard technician must be assigned to an appropriate military unit (to include military grade and specialty) in the State where his technician job is located (see 32 U.S.C. 709 (b)). The concept of the National Guard technician program is that technicians will be militarily assigned to the same unit in which his technician job is located. In other words, a technician will perform his technician duties, his military training duties, and be mobilized to active duty in the same unit. Unless specifically approved by NGB-TN, the assignment will be in the unit by which employed, and the technician must be performing in the MOS/AFSC determined to be compatible with the technician position occupied. Situations of military or technician grade inversion are not permitted; i.e., a technician is subordinate to an individual in technician status but senior to him in a military status.

Adjutants general may approve exceptions to compatibility in the following instances:

a. If the military appointment requirements (officer, warrant officer, enlisted) for a particular position change, and the change would disqualify the technician for employment, he may be continued in an incompatible status. A continuing effort must be made to reassign these technicians to compatible positions.

b. One-year exceptions may be granted to permit military assignments for officer technicians to gain command experience. Extensions beyond one year must be submitted to NGB-TN and must clearly document and substantiate the request. All locally approved situations that fall into the above categories must be documented, approved by the State Adjutant General, or his designee, and filed in the temporary side of the technician's Official Personnel Folder.

c. Technicians assigned as USPFO examiners may occupy military positions in the ANG. Other USPFO positions may be occupied by members of the ANG when authorized by the Chief, National Guard Bureau. Any case that is not clearly covered by the above is to be forwarded to NGB-TN for a policy determination. Requests must outline all circumstances that have a direct bearing on the case.

APPENDIX 6

2-3. FAILURE TO MEET THE REQUIREMENTS OF THE POSITION

a. When a technician can no longer meet the requirements of the technician position, removal from the position is required. This includes such situations where a technician loses flying status; is physically unable to perform his duties; fails to meet the security standards of his compatible military assignment; fails to meet the medical requirements of his technician position/compatible MOS/AFSC; or fails to maintain the military grade/rank, branch of service, or compatible military assignment for the technician position occupied. (See paragraph 2-4 for specific guidance on the Federal recognition process.)

b. As appropriate, management may remove the individual from his technician position by reassignment, change to lower grade, or termination. The placement offer must be made in writing and include an explanation as to why the action is being taken. The technician will be given a reasonable amount of time (normally 10 days) to accept or reject the offer. The technician must be advised that rejection of the offer will result in termination from employment and that the 30-day advance notice required by 32 U.S.C. 709(e)(6) starts the day after the technician receives the offer.

c. If no placement actions are made, a written notice of termination, which includes explanation as to why the action is being taken, must be given to the technician at least 30 days before the termination date.